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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

MORGAN PHILLIPS, INC.,

Plaintiff and Appellant,

v.

JAMS, INC., et al.,

Defendants and Respondents.

B209780

(Los Angeles County
Super. Ct. Nos. BC308482 and
BC318135)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Mary Ann Murphy, Judge. Affirmed.

Hill, Farrer & Burrill and Daniel J. McCarthy for Plaintiff and Appellant.

Long & Levit, Joseph P. McMonigle, Jessica Rudin MacGregor and John B.
Sullivan for Defendants and Respondents.

INTRODUCTION

Morgan Phillips, Inc. appeals from the granting of summary judgment entered in favor of defendants JAMS/Endispute, L.L.C., JAMS, Inc. (sometimes referred to collectively as JAMS), and John B. Bates. Because we conclude that Bates' conduct in providing dispute resolution services to Morgan Phillips and a third party (as well as JAMS' involvement as Bates' sponsoring organization) is shielded by absolute arbitral and/or quasi-judicial immunity, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Morgan Phillips, Inc., a retailer of specialty bedding products, filed the present action in July 2004. It named as defendants Chittenden and Eastman Co., and Eastman House of California, Inc. (collectively "C&E"), who had contracted with Morgan Phillips to supply mattresses and box springs, which were to be constructed according to Morgan Phillips' specifications.¹ Morgan Phillips also sued JAMS and Bates (sometimes referred to collectively as defendants), who were retained by Morgan Phillips and C&E in August 2000 to mediate a dispute regarding the quality of the bedding products supplied by C&E. Morgan Phillips had filed a lawsuit against C&E in October 1999 (Los Angeles County Superior Court Case No. BC217763). In September 2000, Bates assisted the parties in reaching a settlement. However, in 2002 Morgan Phillips was again dissatisfied with the products supplied by C&E, and invoked a provision in the parties' 2000 stipulation for settlement that "[d]isputes regarding this matter will be submitted to [Bates] for binding resolution." Bates' conduct in attempting to resolve the

¹ The C&E defendants are not parties to this appeal.

dispute, during proceedings held in September and October 2002, forms the basis for the present lawsuit.

The Prior Appeal

This is the second time the matter is before us on appeal. The first time, we reversed a judgment of dismissal based upon the trial court's sustaining of defendants' demurrer without leave to amend. (*Morgan Phillips, Inc. v. JAMS/Endispute, L.L.C.* (2006) 140 Cal.App.4th 795 (*Morgan Phillips v. JAMS*).) The trial court had ruled that Morgan Phillips' claims were barred by the doctrine of arbitral immunity, but we concluded that, *based on the allegations pleaded* by Morgan Phillips, a narrow exception to arbitral immunity applied because Bates, acting as an arbitrator, breached his contract by failing to make any decision at all. (*Id.* at pp. 801-802, citing *Baar v. Tigerman* (1983) 140 Cal.App.3d 979.)

Morgan Phillips' first amended complaint, the operative pleading before us in the prior appeal, alleged the following regarding the dispute resolution proceedings conducted by Bates:

“On or about September 11, 2002, Bates held ‘a four-hour hearing’ at which Morgan Phillips produced an ‘actual demonstration of settlement merchandise cut open to reveal that . . . the bedding did not conform’ to the requirements of the settlement agreement. After this evidence was presented, Bates continued the hearing to October 25, 2002, and ‘specifically informed the parties at that time that if the parties were unable to settle the dispute before the next scheduled arbitration session Bates would exercise his authority as arbitrator to render a binding arbitration decision. In addition, Bates specifically instructed counsel for [the suppliers] that at the next hearing counsel should be prepared to rebut the evidence proffered by Morgan Phillips and further, requested that Morgan Phillips prepare

an updated damage study from its economic expert.’ Bates was ‘specifically and directly informed’ that Morgan Phillips was in severe financial distress as a result of the breach, and that ‘there was a substantial risk that Morgan Phillips would be unable to continue in business if the dispute was not decided promptly.’

“When the arbitration reconvened on October 25, 2002, Morgan Phillips offered ‘evidence of laboratory testing’ showing that the suppliers’ merchandise breached the settlement agreement, and also submitted an updated damage study. Bates then gave the suppliers the opportunity to present evidence in their defense. When the suppliers finished, ‘all evidence had now been submitted to Bates for determination of the dispute. Bates did not request that either side present any additional evidence or to prepare any written statement of the evidence or legal argument. The arbitration hearing was now concluded and the case was now ready for Mr. Bates’ arbitration decision.’

“Bates then ‘separated the parties into different rooms and [met] with each side separately in an apparent effort to settle the case without rendering an arbitration award. Over the course of the next few hours, and until the lunchtime break, Bates shuttled back and forth between the parties to discuss various alternative resolutions. However, as the lunchtime break was ending, Bates suddenly announced, with no lawful justification, that he decided to withdraw as the arbitrator. Bates thereafter failed and refused to issue a binding arbitration award.’” (*Morgan Phillips v. JAMS, supra*, 140 Cal.App.4th at pp. 798-799.)

We summarized Morgan Phillips’ allegations as follows: “taking the relevant allegations as a whole, Morgan Phillips allege[d] that after completion of the evidence and argument at the arbitration proceeding, Bates conducted failed settlement talks. He then sought to coerce an unfavorable settlement from Morgan Phillips, and avoid having to issue an award, by withdrawing as arbitrator without

justification. He offered to continue mediation efforts, but he refused to issue an award. There is no indication that Bates gave any reason for his withdrawal.”

(*Morgan Phillips v. JAMS*, *supra*, 140 Cal.App.4th at p. 802, fn. omitted.)

“Based on these allegations, Morgan Phillips alleged two causes of action against both JAMS and Bates: the sixth, for breach contract, and the seventh, for negligent breach of the duty to provide binding arbitration services. Morgan Phillips alleged one cause of action against JAMS alone: the eighth, a representative action for unfair competition and false advertising, in violation of Business and Professions Code sections 17200 and 17500.” (*Morgan Phillips v. JAMS*, *supra*, 140 Cal.App.4th at p. 800.)

On review of a judgment of dismissal after the sustaining of a demurrer, we were of course required to “accept as true the allegations of Morgan Phillips’ first amended complaint,” which “d[id] not reveal whether Bates gave any reason for his withdrawal.” We concluded that Morgan Phillips had adequately alleged that Bates, by refusing to render an award, breached his contractual duty to conduct a binding arbitration. (*Morgan Phillips v. JAMS*, *supra*, 140 Cal.App.4th at p. 803.)

“Assuming the allegations of the first amended complaint to be true, we conclude[d] that the trial court erred in ruling that the doctrine of arbitral immunity bar[red] Morgan Phillips’ claims against JAMS and Bates.” (*Id.* at p. 804.) We reversed the judgment, and remanded the matter to the trial court.

Morgan Phillips’ Motion for Leave to Amend Its Complaint

On remand, the parties conducted discovery. Morgan Phillips then sought to file a second amended complaint to allege a cause of action for fraud, and to delete certain allegations.

Morgan Phillips claimed that it learned during discovery that Bates never conducted an arbitration or made an award constituting a “binding resolution,” and that he was not experienced in doing so, was not competent to do so, and never intended to do so. The trial court denied the motion to amend without prejudice based on Morgan Phillips’ failure to comply with California Rules of Court, Rule 3.1324.

The court pointed out at the hearing: “You’re supposed to give me when you discovered facts and the reasons why – what facts you discovered, when you discovered them, and the reasons you couldn’t have amended earlier. So I didn’t think [the proposed second amended complaint] complied [with] any of those.” Counsel for Morgan Phillips responded that he discovered the facts underlying the fraud cause of action while taking the depositions of a JAMS representative and Bates (and that he had outlined that in his declaration).

Morgan Phillips renewed its motion to amend its complaint. The trial court again denied the motion for leave to amend its complaint, this time with prejudice, based on Morgan Phillips’ failure to comply with the requirements of California Rules of Court, rule 3.1324(a)(2) and (3), which require the moving party to state what allegations are proposed to be added or deleted and where, by page, paragraph, and line number, the additional and deleted allegations are located.

Defendants’ Motion for Summary Judgment

Defendants filed a motion for summary judgment in which they asserted that the undisputed facts demonstrated that Bates had recused himself from providing a binding resolution of the dispute between Morgan Phillips and C&E based on his determination that he could not be fair and impartial. Defendants characterized the September 11, 2002 and October 25, 2002 sessions as mediations only, not

arbitrations. Defendants argued, however, that whether the proceedings conducted by Bates in September and October 2002 were deemed arbitrations or mediations, they were subject to either arbitral immunity or quasi-judicial immunity, and defendants were therefore entitled to entry of summary judgment in their favor. Defendants also contended in their motion for summary judgment that Morgan Phillips could not establish that it had been damaged as a result of defendants' actions because it could not present evidence demonstrating that it could have collected an arbitration award against C&E.

Defendants filed a separate statement of undisputed material facts in support of their motion for summary judgment or, in the alternative, for summary adjudication of issues, setting forth the facts regarding their claims that Morgan Phillips' action was barred by (1) arbitral immunity, (2) quasi-judicial immunity, and (3) its failure to prove damages.

1. Arbitral Immunity

Defendants set forth as issues subject to summary adjudication that Morgan Phillips' cause of action for breach of contract, its cause of action for negligence, and its cause of action for unfair competition, were barred by arbitral immunity. In support, defendants alleged the following were undisputed material facts: Morgan Phillips' complaint alleged that it suffered damages when Bates breached an agreement to arbitrate a dispute between it and C&E by refusing to enter a binding arbitration award. On September 11, 2002, Bates met with Morgan Phillips and C&E representatives and their attorneys at Morgan Phillips' warehouse, but they did not settle the dispute. Bates suggested they schedule another meeting with him at which he would continue to assist the parties to reach a settlement. He suggested that, if the parties could not agree on a settlement, he would listen to the

parties' presentations and make a determination of an appropriate resolution and place it in a sealed envelope. Thereafter, he would conduct a mediation but, if the parties could not agree to a settlement, he would open the envelope and the parties would enter into a settlement on the terms included in the envelope. One of Morgan Phillips' former attorneys, Joel Bennett, stated during his deposition that he recalled Bates' plan to use the envelope method to resolve the dispute if necessary.

The October 25, 2002 meeting commenced with a joint session between Morgan Phillips and its representatives, C&E and its representatives, and Bates. During that session, Bates determined he could not be fair. He informed the parties he could not be fair because he felt too compassionate toward both sides. He told them that that he could not use the mediation tool he had proposed and recused himself from making any determinations. Bates continued to mediate the dispute until approximately 7:00 p.m. on October 25, 2007.

2. Quasi-Judicial Immunity

In requesting summary adjudication of issues, defendants similarly asserted that Morgan Phillips' cause of action for breach of contract, its cause of action for negligence, and its cause of action for unfair competition, were barred by quasi-judicial immunity. The undisputed supporting facts were these: on September 5, 2000, Bates mediated a dispute between Morgan Phillips and C&E, which resulted in a settlement that was memorialized in three related agreements (a settlement agreement and mutual release, an agreement to furnish products, and an escrow agreement). Morgan Phillips and C&E agreed, at paragraph 9 of the agreement to furnish products: "If the parties with the aid of counsel are unable to resolve a dispute, the matter should then be submitted to John B. Bates, Jr. for binding

resolution under procedures to be established by him, with his expenses to be borne by the prevailing party or if there is no prevailing party, by the parties equally.” The October 5, 2000 escrow agreement provided in pertinent part at paragraph 4: “If the parties and the Escrow Agents are unable to resolve the claim, the matter shall be submitted to John B. Bates, Jr. for binding resolution under procedures established by him, with his expenses to be borne as he shall in his sole discretion determine.”

One and one-half years after the settlement documents were executed, Morgan Phillips’ president, Theodore (Ted) Metas, told his attorneys he believed C&E was breaching the terms of the settlement agreement. On August 6, 2002, Morgan Phillips’ attorney wrote to Bates and invoked the parties’ agreement to submit the matter to Bates for binding resolution.

Thereafter, on September 11, 2002, Bates met with Morgan Phillips and C&E and their respective representatives at the Morgan Phillips warehouse. Metas recalled that Bates began the meeting by saying that they were still in the settlement process unless both sides failed to reach an agreement, and at that time, he would use the binding resolution powers granted to him and he would render a ruling. Morgan Phillips’ and C&E’s representatives signed a mediation confidentiality agreement.

The parties did not settle the dispute on September 11, 2002, so Bates suggested scheduling another meeting with him, and further indicated he would mediate the matter but use the envelope method to reach a binding resolution if the parties could not agree. The parties scheduled the next session for October 25, 2002. During that session, Bates determined he could not be fair, and told the parties he felt too compassionate toward both sides and therefore could not use the envelope method. He recused himself from making any determinations. Bates

continued to mediate the dispute until approximately 7:00 p.m. In a letter dated November 18, 2002 (less than one month after the second session failed to resolve the dispute), Metas stated to his attorney, Bennett, that “Bates’ decision, in the middle of a settlement conference, to remove himself as the mediator in this case is gross misconduct on his part.” Metas continued in the letter: “His decision to withdraw himself from his duties to determine a binding resolution is a clear breach of his contractual obligations that he agreed to as outlined in the court approved settlement agreement. I would acknowledge that Mr. Bates has the right to remove himself, however, at an appropriate time.” “As you recall, Mr. Bates said at the 9/11/02 meeting that, if the parties could not reach an agreement, he would make the decision with the binding resolution powers to which both parties had agreed. . . . He, in essence, set forth procedures to be followed for the explicit purpose of rendering a binding decision should the parties reach an impasse.”

3. Failure to Prove Damages

Defendants further asserted that, as to its causes of action for breach of contract, negligence, and unfair competition, Morgan Phillips could not prove the alleged failure to issue an arbitration award caused it damage. Defendants set forth as undisputed facts that Morgan Phillips had obtained a \$13.4 million judgment against C&E in January 2006, but had been unable to recover any damages from C&E. However, the responses provided by Morgan Phillips to defendants’ interrogatories identified documents that did not relate to Morgan Phillips’ ability to collect on an award against C&E which Morgan Phillips contended defendants were obligated to issue.

Opposition to the Motion for Summary Judgment

Morgan Phillips filed opposition to the motion for summary judgment, and a response to defendants' separate statement of undisputed facts. Morgan Phillips also filed an appendix of additional authorities and evidence in opposition to the motion.

In its memorandum of points and authorities opposing the motion for summary judgment, Morgan Phillips asserted that defendants were obligated to provide a binding resolution of the underlying dispute, but failed to do so. It argued that defendants are not entitled to arbitral immunity, because an arbitration never took place: defendants abandoned the arbitration proceedings, without adequate justification. Morgan Phillips asserted that Bates testified that he did not view himself as partial. However, Morgan Phillips also quoted Bates as stating that because "[b]oth sides were incredibly aggressive," he "was reacting emotionally. . . . And that's why I concluded that I couldn't be fair or impartial." Morgan Phillips argued that this did not justify Bates' withdrawal. It further contended that Bates never withdrew from the dispute, but at most withdrew only one device or protocol Bates claimed he had proposed. Morgan Phillips also contended that defendants could not claim entitlement to quasi-judicial immunity, because Morgan Phillips was not charging defendants with liability for their conduct as mediators. "[T]he plaintiff does not assert that defendant Bates is liable for conducting a mediation or that he could never 'withdraw' . . . from anything. In short, he was entitled to 'withdraw' from a tangential proceeding but, in fact, he did not do so."

Morgan Phillips further asserted that it was damaged by defendants' conduct because Bates should have awarded judgment against C&E in October 2002, and that defendants' delays caused the failure of Morgan Phillips as an ongoing

business. Morgan Phillips argued that its potential judgment against C&E became uncollectible in March 2004 when third parties began looting C&E, and was thus uncollectible when Morgan Phillips was awarded judgment against C&E by the trial court in March 2006.

In Morgan Phillips' response to defendants' undisputed facts, it disputed that Bates ever suggested using the envelope method to resolve the dispute if Morgan Phillips and C&E could not agree to a resolution. Metas filed a declaration in which he stated that the first time he heard about Bates putting a resolution in an envelope was at Bates' deposition in August 2007. Another of Morgan Phillips' former attorneys, Matthew Fairshter, stated at his deposition that he did not recall Bates ever saying anything about writing down a resolution and putting it in an envelope. Edwin Schreiber, counsel for C&E, said he had no recollection of Bates saying he would put his settlement number in an envelope.

Morgan Phillips also disputed that during the session on October 25, 2002, Bates determined he could not be fair and impartial and told the parties he was withdrawing from providing a binding resolution.

In his declaration, Metas accounted for the statement he had made to the trial court at a hearing on December 18, 2006, to the effect that Bates had informed Morgan Phillips' counsel during the afternoon of October 25, 2002 that he was "compassionate to both sides and could not render an impartial ruling." Metas declared that on October 25, 2002, attorney Bennett was not present after lunchtime, and it was co-counsel Fairshter, not Bennett, who told Metas that Bates was refusing to provide a binding resolution. Metas stated that, "upon reflection and with the deposition testimony of Morgan Phillips' former attorneys to refresh my recollection, I believe that the 'too compassionate' rationale was not a

statement by defendant Bates to Mr. Fairshter and passed on to me but, instead, was the reason later imputed to him by Mr. Bennett and passed on to me.”

Fairshter said during his deposition that he did not think Bates explained why he was not going to provide the parties with a binding resolution. Fairshter recalled that Bates “said he wasn’t going to act in that role of an arbitrator. He was a mediator and that’s all he was going to do.” Asked if Bates said why he was not going to provide the parties with a binding resolution, Fairshter said, “I don’t think he did. I know that he had expressed some dissatisfaction with being abused, if you will, by Ted [Metas]. I have no idea, he didn’t say that that’s why or anything else.”

Schreiber, counsel for C&E, testified that he remembered some of the mediation, but “all I recall is at the end we obviously didn’t have an agreement and everybody left.” Schreiber’s recollection was that Bates did not say on October 25, 2002 that he was withdrawing from the proceeding or from the settlement device, but that he withdrew from the matter fairly shortly thereafter. Schreiber did not recall Bates ever indicating that he viewed himself as anything other than impartial, or that he thought he could not be fair to both sides.

Morgan Phillips also set forth additional material facts which purportedly prevented entry of summary judgment. Specifically, Morgan Phillips asserted that defendants, Morgan Phillips, and C&E all understood that Bates was to act as an arbitrator and provide a binding resolution of any dispute arising out of the 2000 settlement agreement. When the settlement with C&E was negotiated on September 5, 2000, with Bates acting as mediator, Morgan Phillips’ president was concerned C&E might breach the settlement agreement. Bates assured Metas that he would promptly resolve (not mediate) any future breach by C&E of the stipulation for settlement. Bates said C&E would not dare breach the settlement

agreement because he would act as a private judge and would render an immediate and binding ruling in the event of any future dispute under the settlement agreement. It was at Bates' suggestion that the 2000 stipulation had specifically provided: "Disputes regarding this matter will be submitted to John Bates for binding resolution."

In his declaration, Fairshter said that when the session on September 11, 2002 failed to resolve the matter, "There was a very specific discussion that Ted had with John Bates specifically about needing Bates to resolve the case." "Ted gets agitated and upset significantly, and so he was expressing to Mr. Bates very specifically that he needed this to get done without it taking months and months and months in litigation and that stuff." In response, "Bates said specifically that he would entertain resolving it." He further explained, "[e]ntertain resolving the case like the language said; that he understood what Mr. Metas' concerns were and he expressed the same thing that I thought was a little queer about it, is he was going to be from a mediator into a decision maker, and he was trying to stay mediator as long as possible unless he absolutely was forced into everything to make a decision."

At mid-day on October 25, 2002, the parties executed a confidentiality agreement that included a provision, handwritten by Bates, as follows: "Should Mr. Bates be called upon to arbitrate any issue, any disclosure requirements and the fact that he has engaged in ex parte communications with parties and counsel are waived." C&E's Schreiber said that language was added to the bottom of the standard mediation confidentiality agreement to reflect that the matter was to be "resolved one way or the other."

Morgan Phillips asserted that its former counsel, Bennett, was incorrect when he said that Bates told the parties why he was not providing a binding

resolution; in fact, Bennett was no longer present when Bates refused to perform. Metas said in his declaration that he recalled that Bennett left during the afternoon of October 25, 2002, to attend a function for his daughter.

However, in order to emphasize the existence of a factual dispute, Morgan Phillips submitted Bennett's deposition testimony in which he said that he did recall the envelope method being brought up by Bates. After describing how upset Metas later became, and how Metas "got in Mr. Bates' face, and unfortunately, got rude and acted, misbehaved," Bennett said that, at the end of the day on October 25, 2002, "Bates communicated to us that he was not going to submit a proposed settlement and . . . he could no longer act fairly because . . . he was commiserating with both sides." Bennett said that Metas was "angry with the proposals that were being made and the way the mediation process was going and unfortunately, he took it out on Mr. Bates, and Mr. Bates just didn't want any part of it anymore." "Bates stated he would not make a recommendation of settlement value because he believed he could not be fair, meaning fair to the parties. He explained he was feeling too compassionate towards both sides. He no longer was a feeling of could be objective [*sic*]." According to Bennett, Bates said he could not recommend a settlement because he felt too compassionate to both sides, and therefore could not be fair.

Morgan Phillips also asserted that Bates was repeatedly invited to testify that on or before October 25, 2002, he had become incapable of maintaining impartiality, but he repeatedly refused to admit that his impartiality could reasonably be questioned. Within the pages of Bates' deposition cited by Morgan Phillips, however, Bates flatly stated that, "I couldn't react in a clinical and intelligent way and could not as such be fair and impartial." Bates agreed that he "certainly felt in part" that he "could not be impartial in the sense that [he] could

not be free from favoritism for or against Morgan Phillips either by word or action,” and therefore decided not to make a determination and withdrew from using the envelope tool; he kept working to try and get the case settled. Asked if it was unethical for a mediator to continue to conduct the mediation when he can no longer be impartial, Bates responded: “I felt comfortable with the process because I was motivated to try and help the parties solve their problem. I just wasn’t comfortable using the device of making a determination for them.”

Morgan Phillips further pointed out that Bates admitted there was no written evidence memorializing his intended use of the envelope procedure, “a supposedly central feature of the parties’ dealings.” Bates acknowledged he did not write down a number and put it in an envelope before the mediation commenced, or at all. Rather, Bates said he withdrew from using the envelope device. Morgan Phillips asserted that he did not “withdraw,” and instead “continued to pressure Morgan Phillips to continue with mediation.”

Defendants’ Reply to the Opposition

Defendants asserted that Morgan Phillips had alleged in its original and in its first amended complaint that Bates withdrew, without justification, after completion of arbitration hearings, and so alleged in order to fit its pleading allegations into the facts of *Baar v. Tigerman*, *supra*, 140 Cal.App.3d 979, the case that sets forth the limited exception to arbitral immunity. In the prior appeal, this court accepted that allegation as true, and found for purposes of demurrer that Morgan Phillips had pleaded facts sufficient to invoke the *Baar v. Tigerman* exception. (*Morgan Phillips v. JAMS*, *supra*, 140 Cal.App.4th at p. 803.) In opposing the motion for summary judgment, Morgan Phillips claimed for the first time that its “true claim” was that defendants agreed to provide a “binding

resolution,” (rather than binding arbitration) but failed to do so. In addition, Morgan Phillips also improperly sought to avoid the numerous admissions made by Metas—in statements made to the trial court, in correspondence sent to counsel in 2002, and in deposition testimony—that Bates recused himself because he was feeling too compassionate to both sides and could not be impartial. Defendants argued that the trial court did not need to decide whether the September and October 2002 proceedings constituted arbitration, mediation, or “binding resolution” proceedings because, in any event, summary judgment was warranted because the action was barred by the doctrines of arbitral and/or quasi-judicial immunity.

Defendants also filed extensive objections to certain evidence relied upon by Morgan Phillips in opposing the motion for summary judgment. These objections were also made in response to Morgan Phillips’ statement of additional material facts. Defendants objected to some evidence based on assertion of the mediation privilege (Evid. Code, § 1119), but later withdrew those objections before the court ruled on the motion for summary judgment. Morgan Phillips had previously waived the mediation privilege and had advised the court that C&E was defunct.

The court sustained defendants’ objection to a portion of Metas’ declaration (on grounds the statement was irrelevant, argumentative, and an improper attempt to create a triable issue of fact by contradicting prior admissions), in which he stated, “My review of discovery taken to date in this case reveals several discrepancies between my recollection of events and other persons’ recollections.” The court also sustained defendants’ objection (on the same grounds as above, as well as improper legal conclusion and hearsay) to the portion of Metas’ declaration in which he contradicted the statement he made in court on December 18, 2006, that his counsel told him at the second session that Bates was compassionate to

both sides and could not render an impartial ruling, and that his counsel, Bennett, was not present that afternoon. Defendants pointed out that Fairshter stated in his deposition that Bennett walked out to the parking lot with him after the session ended, indicating Bennett was present throughout.

The Order Granting the Motion for Summary Judgment

After hearing oral argument, the trial court granted defendants' motion for summary judgment. It explained its reasoning as follows: "The language of the agreements did not require an arbitration. It required 'binding resolution,' that is, binding ADR of a type or types to be determined by Bates 'in his sole discretion.'"

The trial court noted that defendants characterized the September 11, 2002 and October 25, 2002 sessions as mediations only, not arbitrations. The trial court found that the first session was a "fact-finding" session at Morgan Phillips' warehouse. The court said of the second session: "Bates suggested a second session in October, during which each side would present their thoughts about the case, Bates would put a resolution in an envelope and then he would conduct a mediation. [Citation.] If the parties settled, he would tear up the envelope, and if the parties did not settle, he would open the envelope and that would be 'the deal.' [Citations.]" During the course of the second session, Bates began to feel very uncomfortable with the aggressive position being taken by both sides, and felt he was being abused. After Bates began to feel his emotions were going to take over, he advised the parties he could not be fair and impartial under the circumstances and that he could not do the envelope piece. After recusing himself, but only from the envelope piece, he continued with the process for another three to four hours, but was unable to achieve a settlement. Based on the evidence presented, the trial court found that "[d]efendant[s] had met [their] initial burden of showing that

Bates recused himself from the binding portion of the ADR effort because of a substantial doubt of his ability to be fair and impartial and that Bates is entitled to immunity.” Further, the court concluded that Morgan Phillips had failed to raise a triable issue of material fact.

The court ruled that arbitrators are immune from liability based upon a decision to withdraw because of substantial doubt of their ability to be fair and impartial, citing *Morgan Phillips v. JAMS*, *supra*, 140 Cal.App.4th at page 803. Similarly, citing *Howard v. Drapkin* (1990) 222 Cal.App.3d 843, 860, the court ruled that the job of mediators also involves impartiality and neutrality, and mediators are entitled to the same immunity from suit given to others who function as neutrals in attempting to resolve disputes. Bates said he felt comfortable proceeding with trying to help the parties solve their problem, but “just wasn’t comfortable using the [envelope] device of making a determination for them.” “The ‘narrow exception to arbitral immunity occasioned by breach of contract by failing to make a decision’ [fn.] does not apply here. Bates did not fail to make a decision. Bates properly recused himself from the binding portion of his ADR effort. Bates is immune from suit.”²

The court entered judgment in favor of defendants on May 30, 2008. This timely appeal followed.

² We note that the trial court did not base its ruling on the motion for summary judgment on defendants’ argument that Morgan Phillips could not prove damages. Because we agree with the trial court’s ruling on the issue of absolute immunity, we do not find it necessary to discuss the parties’ arguments regarding damages.

DISCUSSION

I. The Applicable Law

A. *Standard of Review on Summary Judgment*

Summary judgment “shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” (Code Civ. Proc., § 437c, subd. (c).) A defendant moving for summary judgment has the burden of showing that “one or more elements of the cause of action . . . cannot be established, or that there is a complete defense to that cause of action.” (Code Civ. Proc., § 437c, subd. (p)(2).) If the defendant does so, the burden then shifts to the plaintiff to show by admissible evidence that a triable issue of material fact exists. (*Ibid.*) We independently review the trial court’s decision. (*Sangster v. Paetkau* (1998) 68 Cal.App.4th 151, 163.)

B. *Arbitral Immunity*

As stated in the prior appeal in this matter, “[f]ormer Code of Civil Procedure section 1280.1 provided arbitrators with immunity coextensive to that of judicial officers ‘when acting in the capacity of arbitrator under any statute or contract.’ (Stats. 1985, ch. 709, § 1, p. 2341.) That statute expired in 1997. (*Stasz v. Schwab* (2004) 121 Cal.App.4th 420, 434 (*Stasz*).) The expiration of the statute, however, did not affect the scope of California common law arbitral immunity, which protects arbitrators from civil liability for conduct in their quasi-judicial capacity, including the exhibition of bias or prejudice in the rendering of their decisions. (*Stasz, supra*, 121 Cal.App.4th at pp. 430-432.) The purpose of arbitral immunity is to encourage fair and independent decisionmaking by immunizing arbitrators from lawsuits arising from conduct in their decisionmaking role.

(*Thiele v. RML Realty Partners* (1993) 14 Cal.App.4th 1526, 1531 (*Thiele*); see *Stasz, supra*, 121 Cal.App.4th at pp. 431-432; see also *Austern v. Chicago Bd. Options Exchange, Inc.* (2d Cir. 1990) 898 F.2d 882, 885-886.) Thus, generally speaking, arbitral immunity ‘shields all functions which are “integrally related to the arbitral process.” [Citations.]’ (*Thiele, supra*, 14 Cal.App.4th at p. 1530.)” (*Morgan Phillips v. JAMS, supra*, 140 Cal.App.4th at pp. 800-801.)

We concluded in the prior appeal, however, that, “[b]ecause arbitral immunity is designed to foster ““principled and fearless decisionmaking”” (*Thiele, supra*, 14 Cal.App.4th at p. 1531, quoting *Corey v. New York Stock Exchange* (6th Cir. 1982) 691 F.2d 1205, 1209), it cannot be used to immunize the *unprincipled* abandonment of the arbitration and refusal to make a decision.” (*Morgan Phillips v. JAMS, supra*, 140 Cal.App.4th at p. 802, italics added.) “The failure to render an arbitration award is not integral to the arbitration process; it is, rather, a breakdown of that process.” (*Id.* at p. 801.) “[B]y failing to make a timely decision the arbitrator ‘loses his claim to immunity because he loses his resemblance to a judge. He has simply defaulted on a contractual duty to both parties.’ (*E.C. Ernst, Inc. v. Manhattan Const. Co. of Texas* (5th Cir. 1977) 551 F.2d 1026, 1033, *opn. mod.* 559 F.2d 268.)” (*Ibid.*) Accepting Morgan Phillips’ allegations as true—that Bates abandoned arbitration without justification and apparently without giving a reason, and refused to render an award, while offering to continue mediation—we concluded that Morgan Phillips had adequately pleaded that the narrow exception to arbitral immunity stated in *Baar v. Tigerman, supra*, 140 Cal.App.3d 979, applied.

We recognized, however, that the evidence of what occurred during the dispute resolution at issue in this case could in due course present a different factual scenario, resulting in a different outcome: “Certainly, a decision to

withdraw because of substantial doubt of the ability to be fair and impartial, or because of a conflict of interest, is entitled to immunity. (See Code Civ. Proc., § 1281.9, subd. (a) and § 170.1, subd. (a)(6)(B); Cal. Rules of Court, appen., div. VI, Ethics Standards for Neutral Arbitrators in Contractual Arbitration, std. 6.) An arbitrator's decision to withdraw based on ethical standards is integral to the arbitral function; the act itself, as well as the consequent failure to render an arbitration award, is covered by arbitral immunity. Further, we do not mean to suggest that parties to an arbitration proceeding are entitled to litigate the validity of an arbitrator's stated ethical grounds for recusal in support of a later civil suit against the arbitrator or the sponsoring organization for breach of the duty to conduct a binding arbitration." (*Morgan Phillips v. JAMS*, *supra*, 140 Cal.App.4th at p. 803.)

C. *Quasi-Judicial Immunity*

This court's prior decision was premised upon Morgan Phillips' allegation that Bates was an arbitrator. In bringing the motion for summary judgment, defendants argued that Bates was instead acting as a mediator, but in any event, the doctrine of quasi-judicial immunity would similarly bar Morgan Phillips from maintaining the present action.

In *Howard v. Drapkin*, *supra*, 222 Cal.App.3d 843 (*Howard*), the court held that a psychologist, while acting as a neutral third party in attempting to resolve a family law dispute, was protected from civil suit by common law quasi-judicial immunity, under which California courts have extended absolute immunity to persons other than judges who act in a judicial or quasi-judicial capacity. (*Id.* at pp. 851-853.) The psychologist in *Howard* provided alternative dispute resolution services pursuant to a private agreement between the plaintiff and her former

husband, “albeit in the shadow of pending litigation.” (*Id.* at p. 855, fn. 6.) Ultimately her status was governed by a court order, but the appellate court pointed out that this fact was not crucial to its conclusion. (*Ibid.*) Rather, the court held that “[t]he job of third parties such as mediators, conciliators and evaluators involves impartiality and neutrality, as does that of a judge, commissioner or referee; hence, there should be entitlement to the same immunity given others who function as neutrals in an attempt to resolve disputes. In a sense, those persons are similar to a judge who is handling a voluntary or mandatory settlement conference, no matter whether they are (1) making binding decisions (such as referees acting pursuant to Code Civ. Proc., § 638, subd. (1), and arbitrators), (2) making recommendations to the court (such as referees acting under Code Civ. Proc., § 639 or mediators acting under Code Civ. Proc., § 4607), or (3) privately attempting to settle disputes, such as the defendant here. [¶] We therefore hold that absolute quasi-judicial immunity is properly extended to these neutral third parties for their conduct in performing dispute resolution services which are connected to the judicial process and involve either (1) the making of binding decisions, (2) the making of findings or recommendations to the court or (3) the arbitration, mediation, conciliation, evaluation or other similar resolution of pending disputes.” (*Id.* at p. 860.) The immunity is not merely a defense to liability; it is absolute and protects neutrals such as Bates from suit. (*Id.* at p. 864.) In addition, quasi-judicial immunity extends to organizations that sponsor arbitrations, such as the JAMS defendants. (*Stasz, supra*, 121 Cal.App.4th at p. 433.) Logically, organizations that provide neutrals or sponsor mediations and other forms of alternative dispute resolution must also enjoy immunity.

The question before us is whether Bates, and JAMS as his sponsoring organization, are entitled to absolute arbitral or quasi-judicial immunity for Bates’

conduct in performing dispute resolution services. Whether characterized as an arbitration, a mediation, or as some other form of alternative dispute resolution, if the undisputed facts demonstrate that Bates recused himself or withdrew from providing a binding resolution based on a doubt whether he or she could be fair and impartial, that act would be integral to his quasi-judicial function and would therefore be covered by arbitral or quasi-judicial immunity. Furthermore, the parties would not be entitled to litigate the validity of Bates' reasons for recusing himself. (*Morgan Phillips v. JAMS*, *supra*, 140 Cal.App.4th at p. 803.) Morgan Phillips contends on appeal that triable issues of fact existed which prevented the entry of summary judgment, but we disagree.

II. Application of the Law to the Undisputed Facts

Morgan Phillips argues that, at a minimum, there are material factual disputes as to whether the September and October 2002 sessions were arbitration-like or mediation-like sessions, whether the envelope method ever was to be used, whether Bates followed his own alternative dispute resolution process, whether Bates actually withdrew from the obligation to provide a "binding resolution" or just from the "envelope piece," and whether he disclosed the reasons for his refusal. Morgan Phillips argues that it makes more sense to infer from the evidence that Bates never really recused himself at all, either as an arbitrator or a mediator. It asserts that if Bates in fact had a substantial doubt as to his impartiality, he was legally required to recuse himself completely, as an arbitrator, as a mediator, and from his own brand of alternative dispute resolution, and to do so in writing.

Defendants maintain that Bates conducted a mediation, not an arbitration, but that summary judgment was appropriate regardless, since either arbitral or

quasi-judicial immunity barred Morgan Phillips' causes of action. Defendants argue that despite its attempts to create triable issues of fact, Morgan Phillips is bound by its previous admissions that Bates stated he could not provide a binding resolution because of his inability to be fair and impartial, and that he properly withdrew from providing a binding resolution. In doing so, Bates was engaging in functions integrally related to the process of alternative dispute resolution, and arbitral and/or quasi-judicial immunity shields all such functions. We agree with defendants.

It is undisputed that Bates, Morgan Phillips, and C&E understood going into the dispute resolution proceedings in September and October 2002 that Bates would attempt to help the parties settle the matter but if they could not agree, he was authorized to, and would, provide a binding resolution. Morgan Phillips' president and sole shareholder, Metas, stated in November 2007 during his deposition that at the beginning of the September 11, 2002 session, Bates said he would use his binding resolution powers to render a ruling if the parties failed to reach agreement. However, during the session on October 25, 2002, Bates determined he could not be fair and impartial, recused himself from providing any binding determination, and informed the parties. During Metas' November 2007 deposition, the following exchange occurred: "Q. [Defense counsel]: I wanted to get the time line right on the October 25th hearing. It appears at line 13 that at the lunch hour Mr. Bates said to your former counsel that he felt he was compassionate to both sides and could not render an impartial ruling; right? A. That's what I was told by counsel. I don't know that Mr. Bates said that, but that's what I was told by my counsel, yes. Q. Okay. And do you have any reason to doubt the statement by your counsel? A. No."

In addition, Metas had written a letter to his former attorney, Bennett, dated November 18, 2002, in which Metas stated: “Bates’ decision, in the middle of a settlement conference, to remove himself as the mediator in this case is gross misconduct on his part.” Metas continued: “His decision to withdraw himself from his duties to determine a binding resolution is a clear breach of his contractual obligations that he agreed to as outlined in the court approved settlement agreement. I would acknowledge that Mr. Bates has the right to remove himself, however, at an appropriate time.” “As you recall, Mr. Bates said at the 9/11/02 meeting that, if the parties could not reach an agreement, he would make the decision with the binding resolution powers to which both parties had agreed. . . . He, in essence, set forth procedures to be followed for the explicit purpose of rendering a binding decision should the parties reach an impasse.” Metas verified during his deposition in November 2007 that he had written the letter. He also stated during his deposition that on October 25, 2002, his other attorney, *Fairshter*, told him that Bates had announced to both parties that he was recusing himself as arbitrator because he felt too compassionate to both sides.

Furthermore, during a hearing in the present case held on December 18, 2006 (after the prior appeal resulted in remand to the trial court), Metas explained to the court, “[O]n October 25th, at the lunch hour, he – well, I was told by our counsel, after the lunch hour, that Mr. Bates said to my former counsel, he felt he was compassionate to both sides and could not render an impartial ruling. However, he would be willing to stay on the rest of the day, to engage in mediation, which reluctantly I agreed to, given the circumstances.”

Bennett, one of Morgan Phillips’ former attorneys, stated in a declaration that Bates said he would not make a recommendation of settlement value because he believed he could not be fair, and explained he was feeling too compassionate

towards both sides. He testified to the same effect during his deposition in January 2008.

In opposition to the motion for summary judgment, Metas filed a declaration in which he contradicted his previous admission (made in the trial court on December 18, 2006) that Bates had announced to the parties that he was recusing himself because he could not be fair and impartial. He said that while his statements were accurately transcribed, he was “concerned about the accuracy of one statement,” i.e., when he said that “Bates had informed my counsel during the afternoon of October 25, 2002 that he was ‘compassionate to both sides and could not render an impartial ruling.’ [Citation.] It is my recollection that after lunch on October 25, 2002 Mr. Bennett had to attend a function for his daughter and he left to go to that function. It is also my recollection that it was Mr. Fairshter, not Mr. Bennett (who was not even there at the time) who told me that defendant Bates was refusing to provide the required ‘binding resolution.’ However, I note that Mr. Fairshter did not recall defendant Bates giving a reason for his refusal. [Citation.] Thus, upon reflection and with the deposition testimony of Morgan Phillips’ former attorneys to refresh my recollection, I believe that the ‘too compassionate’ rationale was not a statement by defendant Bates to Mr. Fairshter and passed on to me but, instead, was the reason later imputed to him by Mr. Bennett and passed on to me.”

To the extent Morgan Phillips sought to create a triable issue of fact by contradicting Metas’ prior admissions, it is not permitted to do so. Accordingly, the trial court properly sustained defendants’ evidentiary objections to the above-quoted portion of Metas’ declaration. Metas had, in his earlier deposition testimony (in which he verified the letter he wrote in November 2002 and the comments he made in court on December 18, 2006), effectively conceded that on

October 25, 2002, Bates informed Morgan Phillips and C&E that he was not going to provide a binding resolution to their dispute because he felt he could not be fair and impartial, and recused himself from doing so. Metas' attempt on behalf of Morgan Phillips to create a triable issue of fact by stating otherwise in his declaration was ineffective. "[T]he normal policy of 'liberal construction' given to declarations opposing summary judgment does not apply where the declaration contradicts the declarant's earlier admissions in a deposition. (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 21, disapproved on other grounds in *Woodland Hills Residents Assn., Inc. v. City Council* (1979) 23 Cal.3d 917, 944; [citation].)" (*Kerr v. Rose* (1990) 216 Cal.App.3d 1551, 1563-1564.) "'Where, as here, . . . there is a clear and unequivocal admission by the plaintiff, himself, in his deposition . . . we are forced to conclude there is no *substantial* evidence of the existence of a triable issue of fact.'" (*D'Amico v. Board of Medical Examiners, supra*, 11 Cal.3d at p. 21, quoting *King v. Andersen* (1966) 242 Cal.App.2d 606, 610.) A party is bound by admissions made in the course of discovery and, on motion for summary judgment, no further evidence of the matters so deemed admitted is required. (*Hejmadi v. AMFAC, Inc.* (1988) 202 Cal.App.3d 525, 553.)

It is not necessary that we resolve whether the dispute resolution proceedings involved here constituted an arbitration or a mediation. Regardless of the exact nature of the proceedings, the undisputed facts support the entry of summary judgment in favor of defendants. Because Morgan Phillips is bound by Metas' prior admissions that Bates informed the parties on October 25, 2002 that he was recusing himself from providing a binding resolution because of his inability to be impartial, Fairshter's deposition testimony, in which he did not recall Bates doing so, and Schreiber's deposition testimony to the same effect, did not serve to create a triable issue of fact.

Similarly, Morgan Phillips tried to establish that a triable issue of fact exists with regard to whether Bates said during the dispute resolution proceedings in 2002 that he was going to use the envelope procedure to resolve the dispute. Bates said in his deposition that he did, and Bennett agreed, but Metas, Fairshter, and Schreiber did not recall Bates doing so. However, whether Bates described his intention to use the envelope procedure is immaterial. The undisputed material facts (including those facts deemed admitted) demonstrate that everyone involved in the dispute resolution proceedings understood that Bates was empowered to provide a binding resolution—by whatever device—if the parties could not agree, and that he intended to do so, but that during the second session he determined he could not be fair and impartial and told the parties he was not going to provide a binding resolution. Those facts are sufficient to establish that, as a matter of law, absolute immunity applies and bars Morgan Phillips from maintaining the present lawsuit. Bates’ conduct was integral to his quasi-judicial function and was covered by arbitral and/or quasi-judicial immunity. Furthermore, Morgan Phillips is not entitled to litigate the validity of Bates’ reasons for recusing himself. (*Morgan Phillips v. JAMS*, *supra*, 140 Cal.App.4th at p. 803.) It was sufficient that Bates, having determined that he could not be fair and impartial in rendering a binding resolution, informed the parties of that fact and of his intention not to provide a binding resolution.

Likewise, the doctrine of arbitral and/or quasi-judicial immunity precludes any inquiry into Morgan Phillips’ assertion that if Bates in fact had a substantial doubt as to his impartiality, he was legally required to recuse himself completely, and not continue in any capacity, including as a mediator. Just as judicial immunity “bars civil actions against judges for acts performed in the exercise of their judicial functions [fn.] and . . . applies to all judicial determinations, including

those rendered in excess of the judge's jurisdiction, no matter how erroneous or even malicious or corrupt," (*Howard v. Drapkin*, *supra*, 222 Cal.App.3d at p. 851), we cannot entertain a civil suit for damages arising out of a neutral third parties' attempts to arbitrate, mediate, or otherwise resolve a dispute. All functions integral to the dispute resolution process are shielded by absolute immunity.

Finally, we reject Morgan Phillips contention that Bates' oral disclosure, that he was withdrawing because he felt too compassionate to both sides, was insufficient, as a matter of law, and he was instead required to disclose the grounds for his recusal *in writing*. Morgan Phillips relies on Canon 3E(2) of the California Code of Judicial Ethics Standards regarding disqualification (Cal. Rules of Court), as well as standard 7 of the Ethics Standards for Neutral Arbitrators in Contractual Arbitration regarding disclosure requirements (Cal. Rules of Court, appen., div. VI). (See also Code Civ. Proc., §§ 1281.9, subd. (a), & 1281.85.) The former standard requires trial court judges to disclose "on the record" information "reasonably relevant to the question of disqualification under Code of Civil Procedure section 170.1." The latter standard imposes a continuing duty on arbitrators to disclose, in writing, all matters that could cause a person aware of the facts to reasonably entertain a doubt about the arbitrator's ability to be impartial (Cal. Rules of Court, appen., div. VI, std. 7(d)), and any other matter that leads the arbitrator to believe there is a substantial doubt as to his or her capacity to be impartial, including bias or prejudice toward a party or lawyer (*id.*, std. 7(d)(14)(B)). Even assuming for purposes of this appeal that these standards are applicable to the proceedings at issue, we conclude that the standards are designed to ensure written disclosure to the parties of information potentially affecting a decision maker's impartiality, but they do not embody a requirement that the decision maker must state the fact of and basis for his or her disqualification in

writing in order for the disqualification to take effect. Standard 10 of the Ethics Standards for Neutral Arbitrators in Contractual Arbitration, which pertains to disqualification, does not state that an arbitrator must disqualify himself or herself *in writing*. (Cal. Rules of Court, appen., div. VI.) Instead, it states, for example, that “an arbitrator *is* disqualified if” he or she “fails to comply with his or her obligation to make disclosures and a party serves a notice of disqualification.” (*Id.*, std. 10, subd. (a)(1), italics added.) In addition, standard 10(c) states that “an arbitrator must disqualify himself or herself if he or she concludes at any time during the arbitration that he or she is not able to conduct the arbitration impartially.”

The comment to standard 7 notes that “A party may disqualify an arbitrator for failure to comply with statutory disclosure obligations (see Code Civ. Proc., § 1281.91(a)). Failure to disclose . . . a ground for disqualification of which the arbitrator was then aware is a ground for *vacatur* of the arbitrator’s award (see Code Civ. Proc., § 1286.2(a)(6)(A)).” Thus, failure to provide the required written disclosure may *result* in disqualification, or vacatur of the award. The ethics standards do not mandate or even seem to contemplate that a neutral third party such as Bates who is conducting dispute resolution services, and who finds himself or herself overtaken by emotion and thus unable to remain impartial, must detail in writing the fact of and causes of his distress in order for his withdrawal to be effective and to immunize him from a later civil suit. The comment to standard 1 states that “[w]hile vacatur may be an available remedy for violation of these standards, these standards are not intended to affect any civil cause of action that may currently exist nor to create any new civil cause of action.” (Cal. Rules of Court, appen., div. VI.) Because we conclude that the undisputed facts demonstrate that Bates disclosed to the participants that he was unable to be

impartial and could not provide a binding resolution, it would (as counsel for Morgan Phillips conceded at oral argument) exalt form over substance to require that his withdrawal be in writing in order to preclude the present lawsuit.

III. Defendants' Waiver of the Mediation Privilege

Morgan Phillips argues on appeal that the trial court repeatedly, and inappropriately, invited defendants to waive their mediation privilege objections to Morgan Phillips' evidence in opposition to the motion for summary judgment, during a hearing on April 11, 2008. According to Morgan Phillips, the trial court made it clear it would be easier for it to rule on the motion for summary judgment if defendants provided that waiver. Otherwise, the court would require briefing on the difference between a mediation and an arbitration. Defendants eventually waived their assertion of the mediation privilege.

Morgan Phillips points out that during discovery, defendants had objected to requests for production of documents and various deposition questions based on the mediation privilege. Morgan Phillips argues on appeal that it should have been allowed to avoid the prejudice resulting from the court's invited change in position by defendants, by allowing Morgan Phillips to obtain the documents and deposition testimony defendants had refused to provide based on the mediation privilege, and also by filing supplemental evidence and points and authorities. Morgan Phillips argues that its due process rights were not protected.

However, Morgan Phillips gives no indication on appeal what evidence it believes might have been withheld pursuant to the mediation privilege. Morgan Phillips fails to demonstrate a violation of due process occurred because it does not reveal in what way it was prejudiced by the purported error. It does not state what supplemental evidence it might have filed, or what it might have argued in its

proposed supplemental points and authorities. In addition, it forfeited any such claim on appeal by failing to request the production of documents or the opportunity to file additional papers in the trial court. The trial court was not obliged to “invite” Morgan Phillips to do so.

Moreover, defendants did not “abandon their theory of the case,” that Bates had conducted a mediation and not an arbitration, by waiving the mediation privilege. Defendants had always argued that the proceedings constituted a mediation, and they continued to make that argument. But they also continued to argue, as they had all along, that the characterization of the proceedings as either a mediation or an arbitration was not dispositive of the motion for summary judgment.

We further note that the trial court did not invite or “improperly coach[]” defendants to waive the privilege, or otherwise indicate that they should do so in a manner that was inappropriate. The court simply defined for the parties the issues it viewed as critical to resolution of the motion for summary judgment, and left it to the parties to act accordingly.

IV. Denial of Motion for Leave to Amend the Complaint

Finally, Morgan Phillips argues on appeal that the trial court abused its discretion by denying, on purportedly “technical requirements,” its motion for leave to amend its complaint to add a cause of action for fraud. Morgan Phillips claimed below that it learned during discovery that Bates never conducted an arbitration or made an award constituting a “binding resolution,” and that he was not experienced in doing so, was not competent to do so, and never intended to do so. On that basis, it sought leave to file a second amended complaint adding a cause of action for fraud, and to delete certain allegations.

The trial court denied Morgan Phillips' motion for leave to amend its complaint based on Morgan Phillips' failure to comply with the requirements of California Rules of Court, rule 3.1324(a)(2) and (3), which require the moving party to state what allegations are proposed to be added and deleted and where the additional and deleted allegations are located.

In short, we conclude that it is not necessary to resolve this issue because Morgan Phillips is barred by absolute arbitral or quasi-judicial immunity from bringing a fraud cause of action, just as it is barred from maintaining the causes of action for breach of contract, negligence, and unfair competition alleged in its operative first amended complaint. Even if we were to assume that the trial court erred in refusing leave to amend, summary judgment in favor of defendants would still have been appropriate.

DISPOSITION

The judgment is affirmed. Defendants are awarded costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, J.

We concur:

EPSTEIN, P. J.

SUZUKAWA, J.